

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

	: CIVIL ACTION NUMBER:
CAPITAL HEALTH SYSTEM, INC.,	: 24-cv-00202
Plaintiff,	:
	:
v.	:
	:
SYMMETRY WORKFORCE SOLUTIONS, LLC	:
and AYA HEALTHCARE, INC.,	: MOTION HEARING
Defendants.	:

Mitchell H. Cohen Building & U.S. Courthouse  
4th & Cooper Streets  
Camden, New Jersey 08101  
June 24, 2024  
Commencing at 2:01 p.m.

**B E F O R E:**                      **THE HONORABLE EDWARD S. KIEL,**  
   **UNITED STATES DISTRICT JUDGE**

**A P P E A R A N C E S:**

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Proceedings recorded by mechanical stenography; transcript  
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1 **A P P E A R A N C E S (Continued) :**

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6 For the Defendants

7 **A L S O P R E S E N T :**

8 GLADYS NOVOA, Courtroom Deputy

9 - - -

1 (PROCEEDINGS held in open court before The Honorable  
2 EDWARD S. KIEL at 2:01 p.m.)

3 THE COURT: Please be seated. Good afternoon,  
4 everybody.

5 Good afternoon. We're on the record in the matter of  
6 Capital Health Systems v. Symmetry Workforce Solutions, et al.  
7 It's case 24-cv-00202.

8 First, if I could have the appearance on behalf of  
9 plaintiff, please.

10 MR. ARGIROPOULOS: Good afternoon, Your Honor.  
11 Anthony Argiropoulos and Tom Kane of Epstein Becker & Green  
12 representing the plaintiff, Capital Health System, Inc.

13 THE COURT: Okay. And on behalf of defendants?

14 MR. SHAFFER: Good afternoon, Your Honor. Brian  
15 Shaffer and Michael Polovich from Morgan Lewis & Bockius on  
16 behalf of the defendants.

17 THE COURT: Okay. I put this on just for a telephone  
18 conference -- I'm sorry, for a conference today because I like  
19 to try to talk through what the issues on a motion to dismiss  
20 would be before we get there.

21 I know there was a motion to dismiss before, and the  
22 contours of that initial complaint are significantly different  
23 than what's in the amended complaint today. And it seems like  
24 that there was some looking at the initial motion to dismiss.  
25 I did read the initial motion to dismiss paper, and some of

1 the counts were dropped and some new counts were added in.

2 And I'm looking at it, I'm sort of scratching my  
3 head, because to me -- and I'll throw it to Mr. Shaffer or his  
4 colleague first, it seems like this is really a breach of  
5 contract claim. And what I understand from a Consumer Fraud  
6 Act claim is that if there is a valid written contract between  
7 the parties, and if the conduct is expressly permitted under  
8 the contract, then there cannot be a Consumer Fraud Act claim.  
9 And there's a question of whether the Consumer Fraud Act  
10 itself applies to this type of service.

11 But when I look at the agreement itself, it was  
12 attached at ECF Number 9-3 as Exhibit 1, I look at the very  
13 words of the contract, and it says, "Symmetry shall use its  
14 corporate affiliates or third-party staffing subcontractors,"  
15 which is defined as agency, "to provide Candidates under this  
16 Agreement."

17 Isn't that what this whole agreement is about, the  
18 provision of nurses under this agreement? And it says in the  
19 agreement itself that the defendants -- and I'm looking at  
20 Mr. Shaffer, it should be the other side -- that the  
21 defendants are -- or Symmetry itself is permitted to use its  
22 affiliated company? And I think that the bulk of the  
23 complaint is that Symmetry used an affiliated company, Aya --

24 Is that the way you pronounce it? Aya?

25 MR. SHAFFER: Aya.

1 THE COURT: -- Aya, as part of its staffing needs.

2 So if you could just address that, first.

3 MR. KANE: Certainly, Your Honor, if I may.

4 So I would say there's really a legal answer to what  
5 Your Honor has said and a factual answer. So we'll take them  
6 one by one.

7 First, as a matter of law, what we're really talking  
8 about here is fraud in the inducement. And New Jersey law  
9 both as to just any fraud claim and under the Consumer Fraud  
10 Act is that if you defraud someone and induce them into a  
11 contract, then the terms of the contract, even if they have an  
12 integration clause, are not what governs. It's the fraudulent  
13 misrepresentations that were made that got you to enter into  
14 that contract. That is the classic case where you look beyond  
15 the four corners.

16 And if you think about it, Your Honor, as a  
17 legal/policy matter, there's an obvious reason for that. The  
18 Consumer Fraud Act is a remedial statute. The New Jersey  
19 Supreme Court has said many times it's to be broadly and  
20 liberally applied.

21 If you are able to negate a Consumer Fraud Act claim,  
22 if you're able to say, yeah, I bought this item under false  
23 pretenses, but, you know, just before I signed to pick up that  
24 car, that, you know, I thought I was getting a Porsche and I  
25 got a Kia instead, just before I signed that contract, there

1 was fine print in there that said integration clause are  
2 limited to the four corners of the contract, there would never  
3 be a consumer fraud claim because those sorts of things happen  
4 all the time.

5 THE COURT: I think the Consumer Fraud Act claim --  
6 well, the fraud in the inducement claim can be separate and  
7 apart from the Consumer Fraud Act claim.

8 MR. KANE: Correct.

9 THE COURT: And that's why you have separate counts  
10 for it.

11 MR. KANE: Yes. And they are, but I believe that  
12 that body of law does apply to --

13 THE COURT: But I don't think a fraud in the  
14 inducement necessarily results in a Consumer Fraud Act claim.  
15 The Consumer Fraud Act claim has to have some unconscionable  
16 aggravating circumstances. And I was reading some cases that  
17 are fairly recent from Judge Vazquez and Judge Bumb, I don't  
18 know if you cite to those cases, but they basically say if you  
19 have a written contract and something is permitted under the  
20 written contract, you can't have a Consumer Fraud Act. You  
21 might have a fraud in the inducement claim. And I have some  
22 questions about the fraud in the inducement claim as well.

23 MR. KANE: Sure, sure.

24 THE COURT: Can't those two be separated out?  
25 Because a fraud in the inducement claim does not equal to a

1 Consumer Fraud Act --

2 MR. KANE: I agree, Your Honor, that they are  
3 distinct claims, but I think that we have both here.

4 I think you can have a situation -- and keep in mind,  
5 there's actually a few different scenarios under the Consumer  
6 Fraud Act. There are affirmative misrepresentations. There  
7 are omissions of relevant information. There's unconscionable  
8 terms. And then there are regulatory violations. And we  
9 actually throughout the complaint I think ultimately make  
10 claims under all those different elements of --

11 THE COURT: Under the regulatory?

12 MR. KANE: Yes. Yes, there is.

13 THE COURT: Because there are, like, construction  
14 contract -- and those are the regulatory terms that you're  
15 talking about. But I don't know if there's any regulatory  
16 terms that the Division of Consumer Affairs has promulgated as  
17 to temporary servicing.

18 MR. KANE: Oh, no, Your Honor, there --

19 THE COURT: Is there?

20 MR. KANE: There are.

21 THE COURT: Okay, okay. I didn't see those cited in  
22 the paper, but --

23 MR. KANE: Well, I think, Your Honor -- and  
24 respectfully, and I don't want to cast aspersions on the other  
25 side, but I do think that was something that should have been

1 part of their discussion, particularly because they say, for  
2 example -- they cite to a body of law saying the Consumer  
3 Fraud Act doesn't apply to these sorts of transactions.

4 Well, it does, because -- and this is something they  
5 don't cite, there's 56:8-1.1.

6 THE COURT: I saw the provision of the PEAA --

7 MR. KANE: Right.

8 THE COURT: -- which says that this type of service  
9 is encompassed in the Consumer Fraud Act.

10 MR. KANE: Correct.

11 THE COURT: And that's an issue -- would it be an  
12 issue of first impression? I know that it basically says that  
13 it is, but is there case law that interprets that to see --

14 MR. KANE: Oh, sure, sure, Your Honor. There is,  
15 there is.

16 THE COURT: And so there's a body of regulatory  
17 promulgations as well?

18 MR. KANE: Yes.

19 THE COURT: And what in the regulatory promulgations  
20 did they violate?

21 MR. KANE: They weren't registered as -- you know, as  
22 a temporary services firm.

23 THE COURT: Is there a private right of action under  
24 that?

25 MR. KANE: That's because any violation of those



1 regulations are violations of the CFA.

2 THE COURT: And it's a private right that you have --

3 MR. KANE: Under the CFA.

4 THE COURT: -- under their failure to register?

5 MR. KANE: Yes.

6 THE COURT: Okay. Is that -- go ahead. You can  
7 finish.

8 MR. KANE: But let me talk about -- I said that  
9 there's the legal portion of it, Your Honor, but there's also  
10 the factual portion. And let me just give Your Honor  
11 30 seconds of background so that this makes sense.

12 What we're dealing with here is an MSP or a managed  
13 services provider. There are two different types of them.  
14 And the distinction between those two different types is  
15 really key, because it goes to the fraud here.

16 One type is what's called a vendor neutral MSP. And  
17 what that means is we are going to the healthcare provider as  
18 the MSP, and we're acting on the healthcare provider's behalf  
19 to find it the best deal that it can in the market. So we're  
20 dealing with lots of different nursing vendors that could  
21 potentially satisfy the need that the hospital has. And we,  
22 the vendor neutral MSP, are going to find the best deal for  
23 you, hospital. And that's the advantage that we give.

24 And by the way, they get paid a premium for doing  
25 that, which is obviously relevant to the ascertainable loss

1 argument that they made.

2 The other type of MSP is sometimes called a single  
3 source or a staffing led MSP. And what that says is, we are  
4 the MSP face of a nursing staffing agency. We're going to  
5 staff you with our nurses. If we run out, we don't have  
6 availability, we may go to others. But you're really -- we're  
7 just the face for this staffing agency.

8 THE COURT: And I understand that you're saying that  
9 you were told that it was going to be a vendor neutral MSP.

10 MR. KANE: Correct.

11 THE COURT: But there's nothing in the agreement that  
12 says that it's vendor neutral. And what you're saying in the  
13 fraud in the inducement claim is that there was all this  
14 advertising out there.

15 MR. KANE: Correct.

16 THE COURT: It was on their website. They said it  
17 was a vendor neutral company.

18 MR. KANE: Correct.

19 THE COURT: But the agreement that you have itself  
20 says there's an integration clause --

21 MR. KANE: Correct.

22 THE COURT: -- that says that we can hire from our  
23 affiliated companies. Right?

24 MR. KANE: If you --

25 THE COURT: How is that fraud in the inducement?

1 MR. KANE: If you look at that provision of the  
2 contract, Your Honor, that is completely -- that, the way it  
3 is drafted, is compatible with both being a vendor neutral and  
4 a staffing led, because what it says is, we have -- we can use  
5 someone that we're affiliated with in addition to other people  
6 out in the market.

7 We agree that if they were a vendor neutral -- truly  
8 vendor neutral and they went out in the market and they really  
9 did have relationships with 57 different vendors as they told  
10 us that they did or told my client that they did, and in some  
11 instances, under certain scenarios, certain days of the week,  
12 whatever it was, the best deal could be had from Aya, if they  
13 actually did that, then that's compatible with the contract.  
14 And I don't know that we would have a claim, and maybe that's  
15 what their defense would be.

16 THE COURT: Hold on. I think you're adding something  
17 to the complaint. I don't see anything in your complaint --  
18 this is just my recollection -- where an affirmative  
19 representation was made by somebody from defendant, from  
20 Symmetry, to your client saying that we're going to be a  
21 vendor neutral MSP. All I saw was that there was a lot of  
22 advertising, and I didn't see any allegation itself that said  
23 that your client actually looked at that advertising or  
24 somebody made that affirmative representation before they  
25 entered into the contract. I didn't see that.

1 MR. KANE: Your Honor, it happened not just before  
2 obviously with the advertising but it happened during the  
3 course of the relationship.

4 THE COURT: But -- oh, that's different. During the  
5 course of the relationship is different.

6 What you're talking about is fraud in the inducement.  
7 Fraud in the inducement talks about at the time of  
8 contracting, there was some fraudulent statement that was made  
9 prior to the contracting. Right?

10 MR. KANE: Except, Your Honor, what I would say is  
11 this: We could also have gotten out of the contract. So if  
12 they're continuing to make those misrepresentations along the  
13 way, which they clearly did in email. There's a point in time  
14 where we said we are --

15 THE COURT: That's a breach of contract claim.  
16 That's a breach of contract. You have a fraud in the  
17 inducement claim. And I don't see anything in the complaint  
18 that says, first of all -- well, fraud in the inducement has  
19 to be some misrepresentation that the defendant made with the  
20 intent to deceive you.

21 MR. KANE: Correct.

22 THE COURT: And that fraudulent representation has to  
23 be made to you.

24 MR. KANE: Yes.

25 THE COURT: Right?

1 And you're talking about something on a website. But  
2 there's no allegation that anybody from your company took a  
3 look at that website or they were induced by it. Right? I  
4 don't see anything in the complaint.

5 MR. KANE: No, Your Honor, we do specifically say  
6 that our people knew that and acted in reliance on it. That's  
7 the inducement.

8 THE COURT: Is there a paragraph of the complaint --  
9 and I'll give you time to take a look at it. And that's why I  
10 have the issue with the fraud in the inducement, because you  
11 keep talking about the vendor neutral representation that was  
12 made. But I don't see an affirmative representation that was  
13 made from Symmetry to your client that says we're going to be  
14 vendor neutral. What I have instead is Exhibit 1 of that  
15 filing on February 2nd which says the complete opposite. We  
16 can use a corporate affiliate.

17 And -- go ahead.

18 MR. KANE: Again, Your Honor, saying we have the  
19 option of using a corporate affiliate is different than having  
20 done a vendor neutral analysis to find the best deal for my  
21 client. If it so happened that someone who was affiliated  
22 with them was the best deal after they looked at 57 different  
23 vendors, which is the representation that was made, and  
24 they -- and that was -- under those circumstances, that's one  
25 thing. And if that's their defense, then maybe we'll hear

1 that.

2 But what we're saying is you never intended to be  
3 vendor neutral. You sold us one thing, it was a bait and  
4 switch. You advertised and said that you were going to do one  
5 service, and you gave us something entirely different, which  
6 is not as advantageous for us, and that we relied on it.

7 THE COURT: Well, you have an interpretation of the  
8 contract that may be different from what the defendants have  
9 an interpretation of the contract. You're reading that  
10 provision that I read before, which is (I) (b) (iii) that says  
11 "Symmetry shall use its corporate affiliates or third-party  
12 staffing." But you're saying that that doesn't permit them to  
13 just use their corporate affiliate staffing. Right? That  
14 that requires them to do something beyond that and get all of  
15 these other bids and everything to figure out what the best  
16 price is for you. Right?

17 But that sounds like a breach of contract claim to  
18 me, and --

19 MR. KANE: I want to be careful --

20 (Court reporter clarification.)

21 THE COURT: Go ahead.

22 MR. KANE: I'm sorry for interrupting.

23 THE COURT: It's okay.

24 MR. KANE: I want to be careful because I'm not  
25 saying it's a breach of contract. What I'm saying is you

1 induced us. You told us this was what you were going to do,  
2 that you would be vendor neutral, that you would work with 57  
3 different vendors. Then you gave us a contract that said,  
4 well, yeah, we're going to work with some vendors who are not  
5 affiliated. We might work with people who we are affiliated  
6 with.

7 It did not say, significantly, Your Honor, we are not  
8 vendor neutral, we are staffing led, and you are only going to  
9 be working with Aya or Aya 71 percent of the time.

10 They had told us it was going to be vendor neutral.  
11 Then they gave us a contract that is literally ambivalent,  
12 that says, well, we may use somebody who is affiliated with us  
13 or we may not and could be read either way.

14 THE COURT: You're represented by counsel, and I  
15 would find it hard to believe that your company is led into  
16 entering contracts without reading them over and understanding  
17 what they mean. Right?

18 MR. KANE: But, Your Honor, respectfully, if you put  
19 yourself in the shoes of someone who has been told we're a  
20 vendor neutral organization, this is what we do, we're vendor  
21 neutral, then they see that provision, and you would read it  
22 as oh, okay, well, yeah, they're vendor neutral, but sometimes  
23 the one that they're affiliated with might win.

24 THE COURT: Maybe your colleague was looking for that  
25 provision. I don't know if you have a copy of the complaint

1 where that allegation is made -- I can see if there's an  
2 allegation that somebody from Symmetry came to your company  
3 and said, we're going to be vendor neutral, we're going to use  
4 57 different agencies to get the best price, and that was done  
5 before the execution of the agreement, that would be fraud in  
6 the inducement if they later on -- or could potentially be  
7 fraud in the inducement if they later on didn't live up to  
8 that representation. But I don't see -- let me just ask them.

9 Am I right? Is there a representation in the amended  
10 complaint itself that talks about this direct and fraudulent  
11 representation that was made?

12 MR. POLOVICH: There's not, Judge Kiel. And,  
13 actually, I just want to point out the very next sentence of  
14 that paragraph that we've been talking about.

15 THE COURT: That's in the contract?

16 MR. POLOVICH: Yes. So we've been focusing on the  
17 sentence that says that Symmetry shall use corporate  
18 affiliates or third-party agencies. But the very next  
19 sentence addresses the issue of neutrality. And it says,  
20 "Symmetry shall have the discretion to choose its Agencies."

21 So while my colleague just represented to the Court  
22 that the contract was, quote, ambivalent about neutrality,  
23 it's actually the exact opposite. The contract expressly  
24 addresses that question, and it expressly states that Symmetry  
25 has discretion. That's the opposite of promising vendor



1 neutrality.

2 Now, with respect to fraud in the inducement, the  
3 exact reason that we have inadmissible parol evidence in  
4 situations like this is where you have sophisticated parties.  
5 You have a fully integrated contract, one that, as this one  
6 does, expressly says that the parties disclaim reliance on any  
7 representations not contained in the four corners, is when a  
8 contract addresses the very thing that you're citing parol  
9 evidence for, that's when that parol evidence is inadmissible.

10 THE COURT: Let me talk about the Consumer Fraud Act.  
11 And this is sort of the question that I have.

12 Well, first of all, you have a question whether the  
13 Consumer Fraud Act applies at all. And you say it doesn't  
14 because it's not a consumer product, it's not a consumer  
15 transaction.

16 But there's a provision in the Consumer Fraud Act  
17 itself that says this type of business is subject to the  
18 Consumer Fraud Act.

19 Now, I understand your argument about the learned  
20 professional.

21 MR. POLOVICH: Yes.

22 THE COURT: But you're not selling learned  
23 professional services. You're selling the services of learned  
24 professionals. Right?

25 MR. POLOVICH: Yes.

1 THE COURT: That's a completely different thing. And  
2 it seems to me that that would fall within the ambit of the  
3 Consumer Fraud Act. But let me hear from you on that.

4 MR. POLOVICH: Sure. I'd like to make two separate  
5 points to address that.

6 So the first is actually before we even get to the  
7 question of learned professionals exemption. And I just want  
8 to point out that this count, Count 4 about regulatory  
9 violations, is only made against Symmetry. It's not made  
10 against Aya. And there's a reason for that.

11 Aya is registered as the temporary help services  
12 firm, as the temporary healthcare firm in the state of New  
13 Jersey. And there's a reason for at that. Because the  
14 definitions of both of those -- of both of those, I guess,  
15 titles that you could give to a company require that that  
16 company employs the individuals that, you know, fall under  
17 those definitions.

18 THE COURT: Okay. And you're an intermediary --  
19 Symmetry is an intermediary that didn't have to be registered?

20 MR. POLOVICH: Right. And the complaint actually has  
21 a bunch of details about how MSPs, you know, aggregate and  
22 source staffing from agencies that have these nurses.

23 So, I mean, there's a reason that that is the only  
24 count that is only made against Symmetry. And so before we  
25 even get to the assumption that those regulatory definitions

1 apply, I think there is a question that would have to be  
2 answered. And we can of course develop that through the  
3 briefing.

4 As to the learned professionals exemptions, I agree  
5 with the Court that that question has not yet been squarely  
6 answered by case law.

7 First of all, there's not a case that says nurses  
8 aren't professionals. But beyond that, there's obviously not  
9 a case that says --

10 THE COURT: I think nurses are learned professionals.  
11 I think they would --

12 MR. POLOVICH: I agree. I think that would be pretty  
13 obvious.

14 THE COURT: That would be obvious.

15 MR. POLOVICH: In full candor, right, we don't have a  
16 case that says that yet.

17 And then even if we get to the conclusion they are  
18 learned professionals, we have the next question of would that  
19 exemption extend to the companies that are either sourcing or  
20 aggregating or supplying them.

21 And we've cited cases. You said that you read the  
22 initial motion to dismiss --

23 THE COURT: I did.

24 MR. POLOVICH: -- as well as the letters.

25 You've seen that we've developed a line of cases that

1 at least raise I think a very plausible argument that is  
2 worthy of the parties' briefing all the nuances of that back  
3 and forth. Where there are instances where the suppliers,  
4 right, companies such as the lab diagnostic companies, the  
5 hospitals, law firms, so actual corporate entities, have been  
6 held to be exempt, particularly when the claims go to things  
7 such as allegations of overbilling, as they do here.

8 So I think that at a bare minimum that question is  
9 worth being developed through.

10 THE COURT: And I certainly never prohibit the filing  
11 of a motion to dismiss. I just like to flesh things out a  
12 little bit and discuss it.

13 I think there are significant questions of whether  
14 the Consumer Fraud Act, even if it did apply, would provide a  
15 plausible claim, given that there's a written contract.

16 And just to give you the two cites, the one from  
17 Judge Vazquez was *Marshal v. Verde Energy*. It's 2019 WL  
18 1254562. And that was a case where there was a discount  
19 energy company, and the discount energy company went to  
20 consumers and said, hey, we're going to give you much less  
21 charges than PSE&G or whoever it was giving their energy. It  
22 didn't turn out to be true, but there was a written agreement.  
23 And the written agreement said that -- well, the written  
24 agreement didn't provide for that kind of solid  
25 representation, and Judge Vazquez said that there was no

1 Consumer Fraud Act because the contract itself applies and the  
2 Consumer Fraud Act can't be used as a way to get around the  
3 written contract between the parties.

4 And Judge Bumb had a case *Dautrich*, D-A-U-T-R-I-C-H,  
5 v. *Nationstar Mortgage*, 2018 WL 3021786. Basically the same  
6 thing, if you have a written contract, you have a breach of  
7 contract claim. If there's something done in violation of the  
8 contract and there needs to be something beyond a breach,  
9 substantial aggravating circumstances.

10 And also, just the thing that you might want to  
11 address in your discussion if you do file a motion to dismiss,  
12 whether this is a jury question or a legal question. And I  
13 read Judge Vazquez's opinion whether a business practice is  
14 unfair is a question for the jury, but if the claim is founded  
15 on written statements, then the Court must make a legal  
16 decision whether the practice is unlawful in light of the  
17 writing.

18 So I give you some of that guideline.

19 So is there anything further, like, for example, on  
20 the fraud in the inducement claim, do you want to address that  
21 at all?

22 MR. POLOVICH: Sure. So as we already noted, I think  
23 that the fraud in inducement claim is barred by parol evidence  
24 here.

25 The entirety of the claim -- and I think Your Honor

1 pointed this out from the get-go. I mean, the complaint here  
2 kind of suffers from a square peg/round hole problem because  
3 we do have a contract that governs.

4 THE COURT: Let's say they do file a second amended  
5 complaint and they say that we have records that John Smith  
6 from Symmetry made the representation that it'd be vendor  
7 neutral and we're not going to ever use our affiliates.

8 Does that get past a motion to dismiss?

9 MR. POLOVICH: No, not at all. And the reason for  
10 that -- and actually, not only does it not get past it, we  
11 would still be dismissed with prejudice. And the reason for  
12 that is that the case law makes clear that the only exception  
13 for parol evidence is when that parol evidence, when you're  
14 using it for fraud in the inducement, when it speaks to what  
15 the case law calls something, quote, extraneous to the  
16 contract. And what it goes on to explain, extraneous means a  
17 subject or topic that the contract does not address.

18 THE COURT: Right.

19 MR. POLOVICH: And as we've talked at length --

20 THE COURT: Right. The parol evidence on a fraud in  
21 the inducement can't contradict the terms of the written  
22 contract.

23 MR. POLOVICH: Right. And here the contract  
24 expressly says that Symmetry has discretion.

25 THE COURT: Plaintiff, if you put that in there,

1 isn't that kind of representation, even if it's made, barred  
2 because -- it wouldn't be permitted under fraud in the  
3 inducement, because that representation would be contrary to  
4 what the written agreement says?

5 MR. KANE: Your Honor, respectfully, I don't think it  
6 is. To say -- again, what you're talking about is the model  
7 of what we're doing. To say that you have discretion to  
8 choose someone after you've done a vendor neutral analysis is  
9 different than saying, we told you we were going to do a  
10 vendor neutral analysis but we're not doing it. And that's  
11 the difference, is that someone having been told -- and I  
12 would just say, Your Honor, before I forget, I direct the  
13 Court's attention to paragraph 272. That is one of the spots  
14 in the complaint where we specifically say that Capital Health  
15 relied on this knowing misrepresentation when entering into  
16 the agreement.

17 THE COURT: Yes, but where does that knowing  
18 misrepresentation come from? Does it come from the  
19 advertising that was out there on their website, or was there  
20 an affirmative representation that was made to your company  
21 from somebody from Symmetry before entering into the contract?

22 MR. KANE: So I would say that there's three  
23 different types, Your Honor.

24 One is that there was an NJHA letter, where there was  
25 advertising that came via the NJHA to all the hospitals in the

1 area, including Capital Health.

2 THE COURT: I saw that, and it says that the NJHA  
3 letter came to all the hospitals. It doesn't say that your  
4 client looked at it and relied upon the representations  
5 therein.

6 MR. KANE: Well, Your Honor, I think that's what  
7 paragraph 272 says.

8 Respectfully, Your Honor, what I would say is maybe  
9 this is something about pleading. And under a 9(b) standard,  
10 we have to give the who, what, where, when of the fraud, what  
11 they did.

12 THE COURT: Right.

13 MR. KANE: Who said it from them, when did they say  
14 it. And we've done all that. In fact, we've attached it.

15 That doesn't mean that as a matter of pleading when  
16 we're saying that the reliance element, not the fraud element,  
17 not the misrepresentation element, but the reliance element,  
18 that we have to say who within our organization did.

19 THE COURT: Where's the fraud element? Where's the  
20 affirmative misrepresentation?

21 And let me just make one comment that I like to make  
22 to very sophisticated counsel like you.

23 I always find it cute, you know, look over here, when  
24 somebody removes and says -- and immediately files a motion to  
25 dismiss saying that it's not based upon -- it's not plausible



1 based upon federal pleadings.

2 MR. KANE: Sure.

3 THE COURT: I always wish the parties could talk to  
4 each other before filing a motion to dismiss. I know you were  
5 before Judge Castner, but that's a thing that I like to at  
6 least ask counsel to do when a case is removed and a state  
7 complaint doesn't meet federal pleadings to talk to each other  
8 before a motion to dismiss is filed.

9 MR. KANE: Sure. And obviously, that was the case  
10 here, Your Honor. New Jersey state courts do not follow  
11 Twombly. It was not a Twombly-oriented initial complaint.  
12 And so once we --

13 THE COURT: But the special pleading requirements of  
14 9(b) require you to state with specificity what the  
15 misrepresentations were. Right?

16 MR. KANE: Yes.

17 THE COURT: And that's the fraudulent  
18 misrepresentation part. There is the reliance part that  
19 you're talking about, but I still haven't gotten that answer  
20 from you, I don't think, where in the complaint does it say  
21 that there was an affirmative representation that was made to  
22 you from Symmetry. You're talking about a letter from NJHA.  
23 That's not from Symmetry to you. Right?

24 MR. KANE: No.

25 THE COURT: You're talking about advertising on the

1 website. That's not to you. Right?

2 MR. KANE: Well, Your Honor, I would say a few  
3 different things.

4 First, the letter was sent in conjunction, NJHA  
5 together with Symmetry sent it to all the hospitals, so I  
6 don't think they can disavow that.

7 Two, it's certainly the case -- and there's a lot of  
8 case law under the CFA -- that misrepresentations on a website  
9 if you rely on them can be the basis of a CFA claim. If our  
10 people saw that and relied on it, and that's exactly what  
11 we're pleading --

12 THE COURT: If they saw it.

13 MR. KANE: -- under two separate --

14 Well, we've pled -- we pled that they have, Your  
15 Honor, under 272. And respectfully --

16 THE COURT: Let me read 272.

17 "Defendants' representations about Symmetry being  
18 100% Vendor Neutral was material to the Agreement, and Capital  
19 Health relied on this knowingly misrepresentation when  
20 entering into the Agreement."

21 That sounds like a conclusory statement. I mean, are  
22 you going back and saying all the things that we said before  
23 are the misrepresentations, the letter, the website? But, and  
24 I ask you pointedly again, other than the letter and the  
25 website, is there anything in the complaint that says that

1 there was an affirmative particular representation or  
2 misrepresentation made to your company?

3 MR. KANE: And it's part of the same conduct, Your  
4 Honor. And I know Your Honor may have a different view on  
5 this than we did.

6 But we by email affirmatively said to them, what's --  
7 you know, are you using Aya, what's your relationship with  
8 Aya. And they lied. And they lied consistent with what they  
9 said in those emails and in the NJHA letter.

10 THE COURT: Wasn't that after the execution of the  
11 agreement?

12 MR. KANE: It was, Your Honor, but so maybe at  
13 best --

14 THE COURT: So how do you go back with that statement  
15 and create fraud in the inducement? Fraud in the inducement  
16 means that you were told before you executed the contract.

17 MR. KANE: Because we could -- if they had told us  
18 the truth that day and said, we lied to you in the NJHA  
19 letter, we lied to you in our advertising, we're not vendor  
20 neutral, we're led by Aya, we could have terminated the  
21 contract and we could have gone and found a vendor neutral  
22 company to deal with.

23 THE COURT: Could have terminated the contract if  
24 they were truthful to you. And that's to me, as I said  
25 before, a breach of contract claim.

1           Okay. I understand.

2           MR. KANE: I think that is in essence a form of fraud  
3 in the inducement, Your Honor.

4           And particularly, I don't think, Your Honor, that you  
5 can look at fraud --

6           THE COURT: A fraud in the inducement.

7           I'm sorry to interrupt you.

8           So you're saying you can have a fraud in the  
9 indictment claim in the continuation of a contract. That's  
10 what you're saying?

11          MR. KANE: Yes. Although I want to be clear about  
12 something, Your Honor. We got the NJHA letter. We saw what  
13 was on the website. We relied on those things. That's what  
14 the pleading is.

15          If Your Honor is saying I'm required as a matter of  
16 pleading to name who it was in our organization that saw those  
17 things and relied on them, respectfully, I don't think that's  
18 true. I don't think that's a requirement. But if we can,  
19 then we should be given the opportunity to do that.

20          THE COURT: No, I don't think that that's a  
21 requirement. I think what the requirement is, is to state  
22 with particularity particularly the fraudulent inducement  
23 claims and the straight up fraud claims. I don't know in the  
24 CFA if that's required.

25          But under the pleadings standard, you've got to say

1 with particularity the who, what, where and when. Right? And  
2 here there's no who, what, where and when. There's no who  
3 made the statement from Symmetry, what was -- when was it  
4 discussed, was it leading up to the negotiations of the  
5 execution of the contract. I don't see that in the complaint.

6 MR. KANE: Respectfully, Your Honor, I think the  
7 difference that we're having is that Your Honor doesn't think  
8 an affirmative misrepresentation can be advertising and  
9 advertising via the internet. And respectfully, respectfully,  
10 Your Honor --

11 THE COURT: You can --

12 MR. KANE: -- I think that's very wrong. I think  
13 that would be erroneous to hold.

14 THE COURT: That's not what I'm saying.

15 MR. KANE: Okay.

16 THE COURT: Somebody from your company had to have  
17 seen it.

18 MR. KANE: Yes, yes.

19 THE COURT: That representation is not here or that  
20 allegation is not here as far as I've seen it. I think I read  
21 the entire 67 pages of the complaint, and I didn't see  
22 anything in the complaint that said your -- somebody from your  
23 company read that website, saw it and then relied upon it in  
24 entering into the agreement.

25 MR. KANE: Well, Your Honor, that's what I think 272

1 is saying when it's talking about those misrepresentations. I  
2 mean, do we have to break it down from a pleading point of  
3 view for each one and say, so and so saw this and so and so  
4 saw that? I don't think that's what's required by 9(b) or any  
5 other pleadings standard.

6 But if that's the case, then we certainly shouldn't  
7 be kicked out of court for that, particularly where there's a  
8 record here I think that's undeniable that there was a bait  
9 and switch. I mean, they said they were vendor neutral.  
10 They're clearly not. That's -- they were clearly lying about  
11 what they were. And now -- and if that's the case, if there's  
12 some -- that rather than finding out in discovery who all from  
13 Capital Health saw it, if we have to say it in a pleading, we  
14 should be given that opportunity. Right?

15 THE COURT: Well, I guess you're saying all these  
16 misrepresentations that were in the NJHA letter and the  
17 advertising and by saying in paragraph 272 that Capital Health  
18 relied on those misrepresentations when entering into the  
19 agreement, that that's sufficient for fraud?

20 MR. KANE: I think it is, Your Honor, under my  
21 understanding of the pleadings standard. If I'm not, I would  
22 ask for the opportunity to replead it.

23 THE COURT: Let me ask from the defendants'  
24 perspective, what if they put in there -- and I know that  
25 there's there -- well, there is the question of whether it

1 contradicts the contract itself. Putting that aside.

2 MR. POLOVICH: Yes, Your Honor. Just to briefly  
3 address what I'm talking about.

4 THE COURT: Yes. Go ahead, go ahead.

5 MR. POLOVICH: And I'll quote from a case, *John Wiley*  
6 *& sons v.*" -- I'm not sure how to pronounce the other word.

7 THE COURT: New Jersey Supreme Court case. Right?

8 MR. POLOVICH: No. It's a DNJ case from 2016.

9 THE COURT: Oh, it's DNJ?

10 MR. POLOVICH: 179 F. Supp. 3d 407.

11 THE COURT: Okay.

12 MR. POLOVICH: And the case says that to satisfy  
13 Rule 9(b), a plaintiff must plead facts showing who made a  
14 misrepresentation and to whom. So 9(b) actually does require  
15 them to give that level of specificity.

16 Additionally, in another case -- and this one is  
17 cited in our letter. It's the *Wegmans Food Markets*, 124 F.  
18 Supp. 3d 360. That case deals with advertisements. And it  
19 goes on to explain that you do have to state what  
20 advertisements you saw, when you saw them and how they induced  
21 you to act.

22 THE COURT: That's what I thought the law was on  
23 pleadings, that you had to do the who, what, where and when:  
24 Who made the statement, when it was made, who was it made to.  
25 That's my understanding, but I'll certainly look at your

1 argument when it comes in. I thought the *John Wiley* thing was  
2 about parol evidence. I thought that was -- it's not about  
3 parol evidence. All right.

4 MR. POLOVICH: And just to be clear, I do agree that  
5 this particular point we're discussing here could be something  
6 that could be cured in another pleading potentially. That's  
7 why, you know, there are other arguments I think that are just  
8 positive that would lead to dismissal with prejudice.

9 THE COURT: Right. If we could clear that up, that  
10 argument could be put away, by the wayside, and then we can  
11 get directly to the issue of whether it contradicts the terms  
12 of the written agreement itself.

13 MR. POLOVICH: Yes. And whether the written  
14 agreement bars them from relying on this other extraneous  
15 representations.

16 THE COURT: And I guess that's why I have these  
17 conferences, to see whether we can shore it up a little bit,  
18 get rid of some of those issues. Maybe you could do the who,  
19 what, where and when a little bit clearer and then just  
20 discuss it among yourselves. And if you don't want to do  
21 that, that's fine.

22 MR. KANE: Well, I guess, Your Honor, the question  
23 is, would Your Honor or opposing counsel like us to simply  
24 replead before we have a motion?

25 THE COURT: That's going to be up to you, but I would



1 suggest it and get rid of that issue itself as to the pleading  
2 with particularity with the fraud claims. Put those in there  
3 more specifically. I know you say that 272 does it, but maybe  
4 you could talk about who made the representation, when it was  
5 made and those types of things. And we can go directly to  
6 whether the CFA applies even and whether the fraud claims are  
7 plausible given what's written in the contract itself.

8 MR. KANE: Understood, Your Honor.

9 THE COURT: And we'll enter a text order today saying  
10 you're granted leave to file your motion to dismiss.

11 If you do, please do talk to each other about a  
12 briefing schedule.

13 Given our discussions today, I'm not going to have  
14 discovery proceed at this point. Let's see what the motion to  
15 dismiss says when and if it's filed. All right?

16 MR. KANE: Understood, Your Honor.

17 THE COURT: Anything further for the plaintiff?

18 MR. KANE: No. Thank you, Your Honor.

19 MR. ARGIROPOULOS: If I may, Your Honor, so I'm  
20 clear.

21 THE COURT: Sure.

22 MR. ARGIROPOULOS: It seems to me that what I've  
23 heard is -- and this isn't argument, this is just procedural.  
24 Tom covered the argument.

25 THE COURT: Sure.

1 MR. ARGIROPOULOS: So the defendants have leave to  
2 grant (sic) a motion to dismiss after our conference.

3 Based on what we heard -- and I don't want to put  
4 words in counsel's mouth -- a repleading, a second amended  
5 complaint, would address a number of the questions that Your  
6 Honor has raised and that counsel has raised.

7 So does it --

8 THE COURT: You don't have to go through the  
9 pre-motion conference procedure again.

10 MR. ARGIROPOULOS: Yes.

11 THE COURT: If you file a second amended complaint  
12 and everybody is going to agree to that -- I don't think  
13 you're going to object to the filing of a second amended  
14 complaint -- then from there you don't have to go through the  
15 whole process again. You just file a motion on that.

16 MR. ARGIROPOULOS: Right. And so my question would  
17 be, you know, I don't want to see us in a position where  
18 counsel files a motion to dismiss, a week later here's our  
19 repleading, and everyone's thinking, what are we doing, we're  
20 wasting a lot of time.

21 THE COURT: Yes.

22 MR. ARGIROPOULOS: I'd like to stage this, so give us  
23 a time period to replead and then --

24 MR. SHAFFER: Yes.

25 THE COURT: Yes. Go talk to each other. You guys

1 are reasonable people.

2 MR. ARGIROPOULOS: Okay. You're good with that.

3 Right?

4 MR. SHAFFER: Yes. And if we reach agreement, then  
5 we would provide a stipulated order or something with the new  
6 dates and deadlines.

7 THE COURT: 100 percent, yes.

8 And talk to each about scheduling. If you have a  
9 conference and decide that there's going to be a second  
10 amended complaint, just send in a proposed consent order,  
11 you'll file it within 30 days and you'll file your motion to  
12 dismiss within 30 days, something like that.

13 MR. POLOVICH: Just to be clear on there, if there is  
14 a second amended complaint, we don't need to go through the  
15 pre-motion letter process?

16 THE COURT: No.

17 MR. POLOVICH: We can proceed directly to filing a  
18 substantive motion?

19 THE COURT: No. Exactly. I think we've talked  
20 enough about it.

21 MR. POLOVICH: Yes. Okay. I just wanted to clarify  
22 that.

23 THE COURT: All right. Very good. Well, thank you  
24 very much for the good arguments. I always very much  
25 appreciate it when counsel come prepared to talk about issues.

1           RESPONSE: Thank you, Your Honor.

2           THE COURT: We're off the record.

3           COURTROOM DEPUTY: All rise.

4           (Proceedings adjourned at 2:41 p.m.)

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6           - - - - -  
7           **FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE**  
8           - - - - -

9

10           I certify that the foregoing is a correct transcript  
11           from the record of proceedings in the above-entitled matter.

12

13           /S/ Ann Marie Mitchell                      26th day of June, 2024

14           CCR-RDR-RMR-CRR  
15           Court Reporter/Transcriber

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